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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. SE 89-50-M A.C. No. 38-00626-05502 AIR
v.	Ridgeway Mine
MORGAN CORPORATION, RESPONDENT	

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Carl B. Carruth, Esq., McNair Law Firm, Columbia, South Carolina, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment in the amount of $2,000, for an alleged violation of mandatory safety standard 30 C.F.R. 56.9005. The respondent filed a timely answer denying the alleged violation, and a hearing was held in Columbia, South Carolina. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the standard as alleged in the proposal for assessment of civil penalty, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(a) of the Act, and (3) whether the violation was "significant and substantial."

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 4-5):

1. At the time of the issuance of the violation, the respondent was an independent contractor performing certain construction work at a gold mine. The respondent is subject to the jurisdiction of the Act.

2. The respondent presently employs 25 employees. At the time of the issuance of the violation the respondent had 56 employees, and its annual production manhours was 53,912.

3. The respondent's history of prior violations is reflected in an MSHA computer print-out, exhibit P-1.

Discussion

The respondent is an independent contractor who was in the process of constructing waste settlement ponds at an open pit gold mine on August 18, 1988. Two or three pan scrapers were being used to construct or build up a strip or barge ramp approximately 200 feet long and 45 feet wide, and three employees of the respondent were involved in this work. Mr. Roosevelt Williams and Mr. Boykin Durham were operating pan scrapers bringing soil to and dumping it on the ramp under construction. Mr. James Wise was assigned as a spotter to direct the pan scrapers where to dump their loads of soil and to serve as a flagger to assist them in backing up because the ramp was too narrow to permit the scrapers to turn around on the ramp and drive out in a forward direction. At approximately 11:00 a.m., after unloading his load of soil, Mr. Williams put his scraper in reverse and began backing up, and the audible backup alarm on the machine was operating and sounding. After backing up for a distance of approximately 100 feet, Mr. Williams looked around and saw Mr. Wise laying approximately 98 feet in front of his machine. Mr. Wise had been run over by the machine, and died at the scene.

MSHA conducted an investigation of the accident (exhibit P-2), and on August 20, 1989, MSHA Inspector Robert M. Friend

issued a section 104(a) "S&S" Citation No. 3254881, citing an alleged violation of mandatory safety standard 30 C.F.R. 56.9005. The condition or practice cited by the inspector states as follows: "An accident resulting in a fatality occurred on 8-18-88 when a spotter was backed over by a pan scraper. A signal from the spotter, sight of the spotter, or other means was not used to insure that the person was in the clear before moving backwards."

Petitioner's Testimony and Evidence

Roosevelt Williams testified that he last worked for the respondent in August, 1988, as a pan scraper operator. He confirmed that he knew the accident victim James Wise, and stated that his job was to act "something like a flagman" to instruct the drivers where to dump their loads of dirt. Mr. Williams stated that on the day of the accident there were two or three pan scrapers operating at the site, and he explained the work that was being performed. He stated that after dumping his load he had to back his scraper up for a distance of approximately 100 feet along the strip that was being constructed in order to turn around and leave for another load. After backing up, and before leaving to get another load, he observed Mr. Wise going to the water cooler. Upon his return with a load of dirt he observed Mr. Wise walking toward the strip area where the load was to be dumped, and Mr. Wise waved him to go ahead. Mr. Williams then proceeded to drive approximately 100 feet along the strip, dumped his load, and backed out for approximately 100 feet when he observed Mr. Wise laying in front of him (Tr. 5-11).

Mr. Williams stated that while he was backing up after dumping his load he did not see Mr. Wise. He stated that from the driver's seat, the visibility to the left of the pan scraper is no problem. With regard to the visibility to the right side of the scraper, he stated that the scraper he was operating on the day in question did not have a right rear view mirror, and as he looked back from his operator's position he could not see any objects that are within 30 feet of the scraper (Tr. 12-14).

Mr. Williams stated that he has operated backhoes, pan scrapers, and small dozers for approximately 4 years, and he confirmed that a pan scraper is normally operated in a forward direction, and that under normal operating conditions he does not generally back it up for 100 feet (Tr. 14). He confirmed that he was instructed at safety meetings "to look out for each other." He also confirmed that he could not see Mr. Wise while backing up on the day in question, and that he had not been instructed not to operate the scraper in reverse without seeing Mr. Wise (Tr. 15). Mr. Williams also stated that part of Mr. Wise's duties were to station himself in a position where he could be seen so

that he could help him back out. Mr. Williams explained further as follows (Tr. 16):

> Q. Well, what happened on this particular day?
>
> A. Just like I said, he was walking up beside me when I was coming in. He was on the left-hand side. I looked back on my left side to back out. I did not see him.
>
> Q. You didn't see him on the left side?
>
> A. When I looked back on the right-hand side, I did not see him, and the right-hand wheel ran over him.
>
> Q. Was it the instruction of the spotter . . . to the instructions to the spotters, were they told to . . . was it their job just to show you where to dump the dirt and then just stay out of your way?
>
> A. Ask me that one more time?
>
> Q. As far as you know, was it the instructions to the spotters to show the pan scraper operators where to dump the dirt and then just stay out of the way?
>
> A. Yes, sir, as far as I know it was his instructions.

On cross-examination, Mr. Williams stated that he was not certain that Mr. Wise was in the clear before he started backing up, and that he had no idea that he was behind the scraper. He also stated that he would not have backed up if he thought that Mr. Wise was behind him (Tr. 17). Mr. Williams confirmed that the scraper was equipped with a back-up alarm which starts sounding as soon as it is put in reverse, that it was operating on the day in question, and that he heard it sounding while the machine was in reverse (Tr. 18).

Robert M. Friend, MSHA supervisory inspector, testified as to his background and experience, and he confirmed that during his prior employment at a quarry he operated a 631 Caterpillar pan scraper similar in size to the one operated by Mr. Williams, and also operated dozers and front-end loaders. He confirmed that he conducted the accident investigation on August 19 and 20, 1988, and that the accident occurred on August 18, 1988. He described the accident scene, and he explained that it was a "barge ramp" approximately 45 to 46 feet wide and 200 feet long, and that it was used as "some kind of pumping facility, perhaps covering a pipeline" (Tr. 21-22). He explained that the respondent was a subcontractor engaged in the construction of pond settling basins used to collect water used in the milling and extraction of gold (Tr. 22).

Mr. Friend stated that his investigation confirmed that Mr. Wise had received hazard recognition and task training (Tr. 25). He identified the scraper operated by Mr. Williams as a model 623 manufactured in the 1970's, and stated that it was similar in size and dimensions as the Caterpillar 623-E scraper depicted in exhibit P-3 (Tr. 27). Referring to a photograph of the machine found on page 5 of the exhibit, Mr. Friend stated that from the operator's seat, visibility to the left of the machine is good, but very poor to the right side. In view of the size of the tires and the structure itself, visibility to the right rear corner of the machine would be extremely poor (Tr. 28).

Mr. Friend confirmed that he issued the citation citing a violation of section 56.9005, because scraper operator Williams failed to make certain by signal or any other means that Mr. Wise was in the clear before moving the scraper. Mr. Friend interpreted "signal or other means" to mean any hand or verbal signal, or knowing by visual observation that Mr. Wise was in the clear (Tr. 29). He confirmed that the reverse signal alarm was working. He stated that mandatory standard section 56.9087 covers back-up alarms, and that section 56.9058 covers the use of spotters while trucks are backing up and dumping. He explained that a scraper is not a truck, and that he cited section 56.9005 because "it covers all equipment and all people" (Tr. 30). He did not believe that the use of a back-up alarm in compliance with section 56.9087 was sufficient to comply with section 56.9005 because Mr. Wise had been assigned to a confined area for several days and Mr. Williams was never instructed to insure that he had Mr. Wise in view before backing up, or to use any kind of signals to make sure that he was in the clear (Tr. 30).

Mr. Friend stated that he based his moderate negligence finding on the fact that the back-up alarm was operating quite well and that Mr. Wise had been instructed that after he signaled the scraper operator where to dump he was to get out of the way (Tr. 31). He also confirmed that he considered the violation to be significant and substantial because the criteria for an "S&S" violation "was met in this case in that an accident did occur and it was a fatality" (Tr. 31).

On cross-examination, Mr. Friend could not recall whether or not he observed a right rear-view mirror on the pan scraper in question during his investigation, but that he did recall that a left rear view mirror was on the machine (Tr. 34). He confirmed that he measured the noise level of the back-up alarm and found it to be quite loud at 120 decibels measured 6 inches from the alarm, and 97 decibels as measured 10 feet from the alarm. He also confirmed that the alarm was located at the very rear of the scraper, and if anyone were standing behind the machine as it backed up the alarm would sound louder and louder as the machine

approached the individual. Mr. Friend agreed that the pan scraper is a heavy piece of equipment with an obstructed view to the rear (Tr. 36).

Mr. Friend believed that he reviewed the coroner's autopsy report in the course of his investigation, and that it indicated that Mr. Wise had a serious heart condition. However, the heart condition was not the cause of death. Respondent's counsel read from the report which quoted the coroner as stating that Mr. Wise may have suffered a heart attack, thereby preventing him from moving out of the path of the machine as it backed up. However, Mr. Friend could not recall receiving a copy of the report, but did confirm that he received a copy of the death certificate (Tr. 39).

Mr. Friend confirmed that Mr. Wise was found approximately 45 feet behind the point where Mr. Williams began backing up his scraper. Mr. Friend stated that even if Mr. Williams had been told not to back up or move the scraper unless he had Mr. Wise in sight, it would not have made any difference insofar as the violation is concerned, but it would have resulted in a low negligence finding as opposed to a finding of moderate negligence (Tr. 46-47).

In response to further questions, Mr. Friend was of the opinion that section 56.9005 was the proper standard to cite in this case, and that it required Mr. Williams to have "line of sight vision" of Mr. Wise before he backed up. He confirmed that this standard is commonly used for all kinds of equipment, including conveyors, regardless of when they are initially started up, and that anytime the equipment is moved, operators must make certain that everyone is in the clear, particularly on the facts in this case where Mr. Williams knew that Mr. Wise was in the immediate area all of the time. Mr. Friend stated further that it is common industry practice that a loader operator does not load a truck if the truck driver gets out of the truck and the loader operator cannot see him (Tr. 48).

Mr. Friend confirmed that pan scrapers do not normally back up, and are usually operated in a forward cycle while loading and dumping. The instant case is unique in that the scrapers were operating in a constricted ramp area, and the scraper operator had to back out after dumping a load. Since the respondent knew that Mr. Wise had 100 percent exposure, Mr. Williams was required by section 56.9005, to insure that Mr. Wise was in the clear before moving the machine (Tr. 51).

Respondent's Testimony and Evidence

Boykin Durham testified that he has been employed by the respondent for approximately 18 months and was hired the same day as Mr. Williams. He testified that they both received safety

training when they were hired, and he explained the training received. With regard to any training concerning keeping spotters in view while operating a piece of equipment such as a pan scraper, Mr. Durham stated as follows (Tr. 57):

> Q. What were you told about that?
>
> A. We was told to . . . if you got a spotter out there to keep him in your eyesight. If you don't see him anywhere, stop and blow your horn and look around for him, you know. If you still don't see him, just get off the machine until you locate him.
>
> Q. Were you told anything about whether or not it would be permissible to move your equipment before you located the spotter?
>
> A. No, you wasn't supposed to move until you located him.
>
> Q. Was Roosevelt there when that was said?
>
> A. Yes, yes, sir.

Mr. Durham stated that he also received additional training during weekly safety meetings, and that the instruction for keeping the spotter in view was discussed or mentioned two or three times a month during these meetings, continuously through the time of the accident (Tr. 58).

On cross-examination, Mr. Durham stated that the training was given by a supervisor, and he confirmed that he has operated a pan scraper for 10 to 13 years, and was operating one on the day of the accident at the same site (Tr. 59). He stated that after dumping a load of dirt on the ramp in question, he would not have backed up without having the spotter in view. If he could not see him, he would have stopped before backing up to look around for him. If he did not see him, he would "just look all around good before I'd back up." He confirmed that this was his understanding of the instructions given him by the respondent, and that he would not have backed up without having Mr. Wise in view (Tr. 60-61).

Mr. Durham confirmed that he is still employed by the respondent as a scraper operator. He further confirmed that spotters are not always used, that it would depend on the work being performed, and stated that "sometimes we don't have them because we don't have to, you know, be in these areas where you can't, you know, see too good" (Tr. 61). He confirmed that Mr. Wise's job at the time of the accident was to show him where to dump the dirt, and that he did not see Mr. Wise go to use the water cooler (Tr. 61).

In response to further questions, Mr. Durham stated that the scraper would not operate too fast in reverse, and although he did not know how fast it would operate in reverse, he estimated that it would not go faster than 2 miles an hour (Tr. 63). He confirmed that he and Mr. Williams would take turns going in and out of the ramp area while dumping their loads, and that Mr. Wise was serving as a spotter for both of them. He estimated that he would make seven trips in and out of the ramp during his shift, and that Mr. Wise would show him where to dump the loads. He confirmed that he always had Mr. Wise in sight while going and coming from the area, and that he had no occasion to ever look for him or to blow his horn and get out of his equipment to look for him (Tr. 64). He confirmed that the person who trained him, and who conducted the safety meetings, would read the instructions from a "safety sheet" and discuss them. He also confirmed that he went to school a few times and was given books and instructional materials (Tr. 65).

Respondent's Arguments

The arguments made by the respondent in its posthearing brief are essentially the same as those made by its counsel during the course of the hearing. Respondent takes the position that section 56.9005, did not require a scraper operator such as Mr. Williams to dismount from his machine to determine Mr. Wise's position to the rear of the machine before he started to back-up the machine. Respondent argues that section 56.9005, has to be interpreted with some common sense, and that it must be read in conjunction with section 56.9087, which requires a back-up alarm on machinery which has an obstructed view to the rear. Counsel argues that a piece of equipment which does not have an obstructed view to the rear need not be equipped with a back-up alarm because the operator can visually determine that everyone has cleared before he moves the machine. However, if the machine operator's view to the rear is obstructed, counsel concedes that section 56.9087, requires a back-up alarm, but he takes the position that by inference, the machine operator must be allowed to rely on the use of the back-up alarm, and he should not be required to dismount from the machine to search about for anyone who may be to the rear of the machine (Tr. 40). Counsel further explained the respondent's position as follows at (Tr. 41):

> THE COURT: But he was also assuming that . . . carrying your argument further, then, that's all the equipment operator has to do because he then will assume that once he puts that backup alarm on, number one, the fellow to the rear is going to hear it, and is going to get out of the way and number two, that fellow would follow company policy that you get out of the way of heavy equipment. Is that true? That's your theory of the case, isn't it?

> MR. CARRUTH: Yes, Your Honor, the MSHA standards do not require an equipment operator, operating a piece of equipment, which has an obstructed view to dismount his equipment and go around and look behind him before he moves it. That's the purpose of the back up alarm. The standard which says that the operator shall assure that everybody is clear before he moves his equipment is assuming that the operator can see in his position. The fact that he has an obstructed view, which would prevent him from being able to see to ascertain that everything was clear, is the reason for the back up alarm Standard. These two, I think, have to be read together. Now, clearly, Your Honor, an operator could not rely on a horn or an alarm and intentionally run somebody down . . . .

Respondent's counsel argued further that the respondent is not required to have both a spotter and a back-up alarm because the language found in section 56.9087, with respect to an obstructed view to the rear of the equipment states that a back-up alarm or a spotter may be used, and it does not state that a back-up alarm and a spotter must be used. Counsel concludes that the operator is entitled to rely on his back-up alarm while backing up his machine, and requiring both a spotter and a back-up alarm would require the operator to always know the whereabouts of the spotter (Tr. 42-43). Counsel's position is further states as follows at (Tr. 52-53):

> THE COURT: The issue on this standard is, as I see it, and you may correct me if I'm wrong, is that MSHA's theory is that the equipment operator, which is a pan scraper operator here, Mr. Williams, shall be certain . . . in other words they said that Mr. Williams had a responsibility by signal or other means. Obviously there wasn't a signal and the other means, I suppose is that Mr. Williams should not have backed up this piece of equipment until he knew precisely where this guy was because he had passed him on the road going in, the man waved him on, they were in a restricted area; they were in a narrow zone; they were on the ramp, they had been doing that for a couple of days and they're holding Mr. Williams accountable for knowing or at least presuming that he should have known that this man was back there someplace and he shouldn't have backed up that equipment without making sure of where he was.
>
> MR. CARRUTH: That's their position.
>
> THE COURT: That's their position. Your position is, well that standard really is not appropriate here because we were complying with the other standard which

says that, you know, you have the audible back up alarm and we had one. According to the testimony in this case it was clearly loud and clear that this machine was backing up, this man should have seen it. It backed up for "X" number of feet before it ran over him. We did everything reasonably possible to prevent the accident, not only that, we were in compliance because we had a back up alarm.

MR. CARRUTH: Hopefully, Your Honor, we would take the position that the back up alarm is a signal. In this case, there is a signal to anybody that may be in the area that when I'm backing up, get out of the way.

THE COURT: But I'm sure that Mr. Welsch and the inspector would argue then, that the operator shall be certain by signal or other means that all persons are clear, meaning that the signal there means a personal signal of some kind, either a wink or a nod or the normal signals that they use because certainly if the operator simply puts his reverse signal on and backs up, that he really doesn't know where the guy is.

MR. CARRUTH: Your Honor, you cannot read that standard without also reading it in conjunction with the other standard and the other standard says you have either/or the back alarm or a signal person, a spotter.

THE COURT: Spotter, right.

MR. CARRUTH: Somebody to signal.

THE COURT: Right.

MR. CARRUTH: Either/or, not both.

THE COURT: Right.

MR. CARRUTH: We had the backup alarm. What they're saying is, we should have had both.

MSHA's Arguments

In its posthearing brief, MSHA takes the position that it is undisputed that equipment operator Williams had an obstructed view to the rear of the pan scraper, particularly on the right side, and that he estimated that this obstruction would be up to 30 feet behind the scraper on the right side. MSHA asserts further that Mr. Williams never made certain that Mr. Wise was clear from behind the scraper, and that it was his understanding that the respondent's instructions required him to make certain that Mr. Wise was in the clear before placing the equipment in

reverse. MSHA's assertion in this regard is incorrect. Mr. Williams testified that he never received any such instructions from the respondent (Tr. 15).

MSHA argues that the cited standard clearly requires certainty before the movement of any equipment, and that this certainty is the equipment operator's responsibility. On the facts of this case, where it is clear that the scraper operator Williams knew that Mr. Wise was behind him, but was not certain that the area was clear while the scraper was operated in reverse, and where there was no signal or other means between Mr. Williams and Mr. Wise to assure this clearance, MSHA concludes that a violation of section 56.9005, had been established. In support of its position, MSHA cites a decision by the U.S. Court of appeals for the Fifth Circuit, affirming a decision by Commission Judge John J. Morris in Texas Industries, Inc., 4 FMSHRC 352 (1982); 2 MSHC 1687 (1982).

In the Texas Industries, Inc., case, a miner was killed when he became entangled in a log washer machine while beating on the machine screen to unclog it while standing on a catwalk. The miner had been observed by the supervisor who was at the scene, and the supervisor left the area after telling the miner that he was going to engage the washer. The supervisor started the washer without any signal to the miner, and after returning to the scene, he found that the miner had become entangled and killed by the machine. Judge Morris found that the evidence established that the supervisor was unsure whether the miner knew that he would turn on the machine immediately, whether he thought there would be a warning signal, or whether he heard the supervisor at all. Judge Morris concluded that the supervisor could not have been sure that the miner would be clear of the machine when it was started, and that certainty was an exactitude demanded by the standard.

In affirming Judge Morris' decision, the Fifth Circuit rejected the mine operator's assertion that in large industrial plants operators could never assure that everyone was a safe distance away from machinery before start-up, and that the standard must therefore be interpreted to require only some signal before the equipment is started. The court concluded that the difficulty of assuring that no one was dangerously near the open tub of the machine was minimal because the supervisor had only to look before starting the machine, and that the only person in the vicinity was the miner. The court stated as follows at 2 MSHC 1915, 1916 (1983):

> The regulation must be given a rational and reasonable interpretation. The certainty referred to must be viewed in light of the danger the machinery poses. As the danger increases, the operator's duty to assure clearance of persons also increases. But in any

instance, the operator must be certain that no one will be endangered by the equipment start-up.

MSHA rejects the respondent's assertion that because the scraper operated by Mr. Williams had an operable back-up alarm as required by section 56.9087, Mr. Williams had no other duty or responsibility to Mr. Wise. MSHA concludes that such a narrow construction of section 56.9005, would negate its application. MSHA agrees that section 56.9005, must be read in conjunction with the back-up alarm requirements of section 56.9087, where there is an obstructed view to the rear, and it concedes that the scraper complied with this requirement. MSHA argues that Mr. Williams knew that Mr. Wise was on the ramp behind his scraper, and that he should have observed the greater duty of certainty to assure himself that Mr. Wise was in the clear before backing up the scraper. Without this certainty, MSHA concludes that Mr. Wise was put in jeopardy in that he may have been incapacitated because of a severe heart condition, and that a back-up alarm would have provided him with no protection. MSHA finds support for the duty owed Mr. Wise by Mr. Williams pursuant to section 56.9005, in the testimony of respondent's own witness, pan scraper operator Boykin Durham, who testified that he had received training and instructions from the respondent that he should not move his equipment before locating the spotter, and that if he could not see the spotter, he was to get off the machine until he located him (Tr. 57). Mr. Durham confirmed that his understanding of the respondent's instruction required him not to back-up his machine without having the spotter in view, and if the spotter were not in view he had to "look all around good before I'd back up" (Tr. 60-61).

Finally, MSHA argues that regardless of who was at fault with respect to the accident, the Commission has consistently held a mine operator liable for a violation without regard to fault. Sewell Coal Co. v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir. 1982); Allied Products Co. v. FMSHRC, 666 F.2d 896, 893 (5th Cir. 1982); Miller Mining Co. v. FMSHRC, 713 F.2d 487, 491 (9th Cir. 1983); Asares, Inc.-Northwestern Mining Dept., 8 FMSHRC 1632 (1986).

Findings and Conclusions

Fact of Violation

The respondent is charged with an alleged violation of mandatory safety standard 30 C.F.R. 56.9005, because the pan scraper operator Roosevelt Williams did not make certain that Mr. Wise, who was acting as a spotter, was clear of the machine before backing the scraper out of the ramp area in question. Although section 56.9005, was subsequently revised and promulgated as section 56.14200, effective October 24, 1988, 53 Fed. Reg. 32525, August 25, 1988, it was in effect at the time

of the accident and the issuance of the citation on August 20, 1988, and it provided as follows: "Operators shall be certain, by signal or other means, that all persons are clear before starting or moving equipment."

The revised standard, section 56.14200, provides as follows: "Before starting crushers or moving self-propelled mobile equipment, equipment operators shall sound a warning that is audible above the surrounding noise level or use other effective means to warn all persons who could be exposed to a hazard from the equipment."

I take particular note of the fact that the newly revised section 56.9005, now promulgated as section 56.14200, does not contain language requiring an equipment operator to be certain that all persons are in the clear before starting or moving his equipment. The current standard only requires an equipment operator to sound a warning that is audible above the surrounding noise level, or to use other effective means to warn all persons exposed to an equipment hazard. Consequently, although section 56.9005, which was in effect at the time of the accident, required an equipment operator to determine with some degree of certainty that all persons are in the clear before moving the equipment, this requirement was deleted from the revised standard, and it now only requires that warnings be given. In short, instead of requiring the operator to be certain of the whereabouts of persons who may be exposed to a hazard of being run over by the machine, the standard now only requires that warnings be given. However, since section 56.9005, was in effect at the time the citation was issued, I conclude and find that it is applicable in this case.

With regard to the safety of spotters, section 56.9058, which was in effect at the time of the accident, provides that if a truck spotter is used, he is required to be well in the clear while trucks are backing into dumping positions. This standard only applies to truck spotters, and since MSHA concedes that a pan scraper is not a truck, I can only conclude that this standard does not apply in this case. Although the newly revised truck spotter standard, now section 56.9305, does contain a provision that requires a truck operator to stop his truck if he cannot clearly recognize the spotter's signal, which comes close to MSHA's belief that section 56.9005 requires a scraper operator to stop the scraper if he not certain that the spotter is in the clear, the spotter standard clearly applies only to truck drivers, and not to mobile equipment operators in general. I have difficulty understanding why MSHA chose to limit vehicle stopping requirements found in this particular standard to trucks and not to mobile equipment in general, particularly in a surface mining operation where heavy equipment such as pan scrapers, loaders, and bulldozers, which often present problems for an operator in terms of clearly seeing to the rear of the machine

from his cab because of the physical configuration of the machine.

Although it appears from the comments of the rule makers considering the promulgation of section 56.14200 (53 Fed. Reg. 32514), that the sounding of an audible warning with respect to self-propelled mobile equipment means back-up alarms or other appropriate mechanical devices which are an integral part of the machine, there is absolutely no guidance or clarification as to the meaning of the language other effective means. I would venture a guess, however, that in any future cases litigated under this standard as now written, MSHA will probably advance the argument that the "other effective means" language in a situation where a piece of equipment is not equipped with a back-up alarm, requires the equipment operator to stop his machine and then look around for spotters or other persons who could be exposed to a hazard in order to warn them to stay in the clear.

The evidence in this case establishes that the pan scraper operated by Mr. Williams was in compliance with the back-up alarm requirements of section 56.9087. The scraper was equipped with an operational back-up alarm which gave a loud and clear signal while the scraper was operated in reverse, and it was sounding when Mr. Williams backed the scraper up and ran over Mr. Wise. However, the respondent here is charged with a violation of section 56.9005, and not section 56.9087. Section 56.9005, as applied to the facts of this case, required pan scraper operator Williams to be certain, by signal or other means, that Mr. Wise was in the clear before he proceeded to back-up the scraper.

Although I find some merit in the respondent's observation with respect to the term "warning" found in the caption to section 56.9005, the language of the standard, and not the caption, is controlling. Although the revised standard, section 56.14200, clearly contemplates that warnings be given by equipment operators before moving the equipment, no such language is found in cited section 56.9005, and I reject the respondent's suggestion that the standard contemplated and required only a warning by the equipment operator, rather than actual first hand knowledge by the operator that all persons are in the clear.

The evidence in this case further establishes that Mr. Williams was operating the scraper along a rather confined and restricted strip or ramp area approximately 200 feet long and 45 feet wide. In addition to Mr. Williams, scraper operator Durham was also operating along the strip hauling in dirt, and due to the restricted area, once the scraper dropped its load after being driven in to the dumping location in a forward position, it could not be turned around and driven out in a forward position, and it had to be backed out and operated in reverse. Mr. Wise was continuously exposed to a potential hazard when the scrapers were backing out along the strip area in question.

Mr. Williams testified that before returning to the strip area with another load he observed Mr. Wise walking towards a water cooler, and that another employee remarked to him that Mr. Wise was "acting funny" and appeared to be over-heated. Upon his return with another load, Mr. Williams passed by Mr. Wise as he was walking toward the unloading area, and Mr. Wise waved at him to proceed along to the unloading area (Tr. 9-11). Under these circumstances, and given the fact that Mr. Wise may had a serious heart condition, and indeed may have suffered a heart attack shortly before he was run over, I believe that scraper operator Williams had a duty to ascertain the whereabouts of Mr. Wise before backing up his machine. Given the fact that Mr. Wise was the only person on foot, and was clearly observed by Mr. Williams when he passed him on his way in to dump his load, I do not believe it would have been difficult for Mr. Williams to stop his machine to make certain that Mr. Wise was in the clear, nor do I find it unreasonable to expect him to do so, particularly where the evidence establishes that the respondent had trained and instructed the scraper operators to stop their machines and ascertain the whereabouts of a spotter such as Mr. Wise before moving the machine any further.

The respondent's assertion that the use of a back-up alarm on the scraper satisfied the requirements of section 56.9005, that a signal be given before the machine was backed up is rejected. While it may be true that the rationale requiring the use of a back-up alarm pursuant to section 56.9087, when the equipment operator has an obstructed view to the rear, is based on the fact that the operator may be prevented from ascertaining that persons are clear from the rear of the machine from his position in the operator's cab because of the configuration of the equipment which may obstruct his view to the rear, I cannot conclude that the same rationale applies with respect to section 56.9005.

In my view, section 56.9087, places a burden on the mine operator to insure that all equipment which has an obstructed view to the rear is equipped with a back-up alarm which can be activated automatically or by the operator of the equipment by simply sounding the alarm. In these circumstances, the equipment operator is not obliged by the standard to be certain that all persons are clear before he moves the machine. All he need to is to sound the alarm. Section 56.9005, however, imposes a higher personal duty on the equipment operator to make certain that all persons are clear before moving the equipment. On the facts of this case, where it is clear from the evidence that Mr. Williams had an obstructed view to the rear and to the right of the machine and could not see any objects to the rear for a distance of some 30 feet from his position in the machine, where there was no right view mirror on the machine, and where he could not see Mr. Wise anywhere, there was clearly no way that Mr. Williams

could be certain that Mr. Wise was clear of the machine from his position at the controls at the time he moved it into reverse and began to back out of the strip area. Under these circumstances, while the use of the back-up alarm as a "signal" to Mr. Wise may have complied with section 56.9087, I cannot conclude that it complied with section 56.9005.

The respondent's suggestion that no violation of section 56.9005, occurred because the scraper had been started for some time before the accident occurred and that Mr. Wise was obviously in the clear when it first started backing up because it backed up approximately 49 feet before striking Mr. Wise is rejected. On the facts of this case, it seems clear that Mr. Williams had no idea where Mr. Wise was positioned after he dumped his load and placed his scraper in reverse and began moving it to back out of the dumping area. At that point in time, and before moving his machine any further in reverse, Mr. Williams had a duty to ascertain the whereabouts of Mr. Wise, and to personally have him in view before backing up for any distance.

The respondent's argument that when read together, compliance with section 56.9087, satisfies the "other means" language found in section 56.9005, and that it is entitled to rely on either a back-up alarm or a flagman to be certain that all persons are in the clear before any equipment is backed up in a situation where the operator's view to the rear is obstructed, is rejected. Without stopping the scraper and looking around for Mr. Wise, there was no way that Mr. Williams could have been certain with any degree of exactitude that Mr. Wise was in the clear by relying solely on the back-up alarm. Given the court's decision in Texas Industries, Inc., and the obvious intent of the cited standard, I conclude and find that the degree of certainty mandated by section 56.9005, is one of exactness and something that is free of any doubt. The use of a back-up alarm as a means of ascertaining whether anyone is free or clear from equipment which is being backed up with an obstructed view to the rear of travel falls short of compliance.

In view of the foregoing findings and conclusions, I conclude and find that a violation of section 56.9005, has been established and the citation is therefore AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood

that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

It seems clear to me that the failure of an equipment operator to comply with the requirements of section 56.9005, and in particular the operator of a pan scraper which has an inherent obstruction of the view to the right rear of the machine from the operator's compartment, to make sure that anyone who may be behind the machine is in the clear, presents a reasonable likelihood of an accident which one may conclude would result in injuries of a reasonably serious nature. On the facts of this case, the failure by the scraper operator to ascertain the whereabouts of the spotter resulted in a fatality when the scraper ran

over him after the scraper operator placed his machine in reverse and began backing up without first ascertaining that the spotter was free of the hazard. Under the circumstances, I conclude and find that the inspector's "S&S" finding was correct, and IT IS AFFIRMED.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

I conclude and find that the respondent is a small independent construction contractor and that the civil penalty assessment which I have made for the violation in question will not adversely affect its ability to continue in business.

History of Prior Violations

A computer print-out of the respondent's history or prior violations (exhibit P-1) reflects that the respondent paid civil penalty assessments in the amount of $227, for eight violations which occurred during the period December 29, 1986, through December 28, 1988. Two of the violations were section 104(a) "S&S" citations issued on July 14, 1988, and six were section 104(a) "single penalty" non-"S&S" citations issued on July 14, and August 23, 1988. Although four of the violations were for violations of the back-up alarm requirements of section 56.9087, none of the violations concerned section 56.9005. I cannot conclude that the respondent's history of prior violations is such as to warrant any additional increases in the civil penalty assessment which I have made for the violation which has been affirmed in this proceeding.

Good Faith Compliance

The record reflects that abatement of the violation was timely achieved by the respondent in good faith after a meeting was held by the MSHA inspector with all equipment operators and spotters during which the operators were instructed to sound their back-up alarms before moving their equipment, and the spotters were instructed to be aware of the equipment working in the area, and that when back-up alarms are used, they were to observe the direction in which the equipment is moving. The operators were also instructed that if they lose sight of the spotter, they were to stop their equipment and remain stopped until the spotter was located.

Gravity

For the reasons stated in my "S&S" findings, I conclude and find that the violation was serious.

Negligence

The inspector's "moderate" negligence finding was based on the fact that the back-up alarm on the scraper which ran over Mr. Wise was activated and sounding loud and clear while the scraper was operating in reverse, and that the accident victim Mr. Wise had been instructed that after he signaled the scraper operator where to dump, he was to get out of the way. Although Mr. Williams testified that he was not specifically instructed to keep Mr. Wise in view in backing up his scraper, the credible testimony of scraper operator Durham, who was hired at the same time as Mr. Williams, reflects that they received training from the respondent and were specifically instructed not to move their scrapers unless they had the spotter in view, and if the spotter was not in sight, they were to blow their horn. If the spotter still did not appear, they were instructed to stop their equipment until they could locate the spotter and have him move to an area where he could be seen. Mr. Durham confirmed that this company rule was discussed two or three times a month during regular safety meetings held continuously up to the time of the accident.

In addition to Mr. Durham's testimony, I take note of the fact that the inspector believed that pan scrapers usually are operated in a forward cycle while loading and unloading, and that the circumstances under which the scraper in question was operating in a constricted ramp area where it was required to back-up for some distance were unique. I also take note of the inspector's accident investigation findings that the respondent had an MSHA approved training plan in effect at the time of the accident, that it was in compliance with the training requirements of Part 48, Title 30, Code of Federal Regulations, and that the accident victim had received hazard training and the dangers of the job had been explained to him. Although the cause of the accident may have been the failure of Mr. Williams to determine that Mr. Wise was clear of the scraper before he backed it up, and his negligence may be imputed to the respondent who is liable for the violation without regard to fault, I take further note of the inspector's finding that a contributing factor to the accident may have been the victim's lack of alertness. Under all of these circumstances, the inspector's moderate negligence finding IS AFFIRMED, and I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence.

On the facts of this case, where the evidence establishes that the respondent had trained and instructed its equipment operators and spotters to avoid the kind of hazard which led to the unfortunate accident in question, I believe it is appropriate to take these factors into consideration in mitigating any civil penalty which should be assessed against the respondent for the

violation in question. See: Allied Products Company v. FMSHRC, 666 F.2d 890, 896 (5th Cir. 1982); Nacco Mining Co., 3 FMSHRC 848, 850 (April 1981); Marshfield Sand & Gravel, Inc., 2 FMSHRC 1391 (June 1980); Old Dominion Power Co., 6 FMSHRC 1886 (August 1981); Secretary of Labor v. Marion County Limestone Company, LTD., 10 FMSHRC 1683 (December 1982).

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $1,000 is reasonable and appropriate for the violation which has been affirmed in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $1,000, for a violation of mandatory safety standard 30 C.F.R. 56.9005, as stated in section 104(a) "S&S" Citation No. 3254881, August 20, 1989. Payment of the penalty is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of the payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge